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ABSTRACT

The meaning of the Constitution is reflected in its preamble, which lists the reasons for framing the Constitution; but, in turn, the rights of the people are either not mentioned or relegated to some tangential concern. The first three articles of the Constitution reveal that "we the people" is determined by the states as well as the crucial issue of who may vote in our representative form of government. The Northwest Ordinance, taking a more enlightened view, included many of the rights currently taken for granted but not mentioned in the forthcoming Constitution. The Bill of Rights, no matter how necessary they seem for political rights, includes nothing about the definition of citizenship and does not mention Indians or Blacks. Clearly then the Constitution and its first ten amendments excluded many from full participation in the political process. Not until Articles 15 and 19 were ratified could Blacks and women vote. Further discussion centers on the lowering of the voting age to 18 and the failure of an anti-discrimination amendment based on sex. Finally, the notion of representative democracy requires the fullest possible participation, but large numbers of people seldom vote. Yet that refusal to vote is also a right. (TRS)

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WE, THE PEOPLE

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WE, THE PEOPLE

Let me begin with a disclaimer. I am an expert in neither constitutional law nor American history. My field of interest--I'm not sure of my expertise--is philosophy and particularly, ethics. What follows is my reflections on the first three words of the preamble of the U.S. Constitution. I am going to try to determine what the U.S. Constitution means by this phrase. My references will be to the Constitution itself and its amendments, to the Northwest Ordinance of 1787, and to Thomas Jefferson.

My rationale for reflecting on the phrase is quite straightforward. The U.S. Constitution, particularly in its Bill of Rights and to a greater or lesser degree, the other amendments, grants people a large number of rights--rights that you and I take for granted. These rights are based on a certain view of human nature and on a certain view about political life.

The Preamble lists several reasons why "we the people" framed and eventually ratified the Constitution:

1. to form a more perfect Union
2. establish justice
3. insure domestic tranquility
4. provide for the common defense
5. promote the general welfare
6. secure the blessings of liberty to ourselves and our posterity.

What follows is seven articles that set up the form and structure of what we know as the United States. There is little in

the seven articles that deals with substantive values as opposed to procedural matters. The rights of the people, whoever they are, are either not mentioned or relegated to a basically tangential concern.

One explicit reference to "the people" occurs in Art. I, Sect. 2.3 where the Constitution discusses apportionment.

> Representatives and direct taxes shall be apportioned among the several states which may be included within the Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.

How one counts here is not directly an issue of a substantive value but the procedure adopted surely implies that some people do not count at all and others do not count as much as some.

The method of election to Congress is to be determined by the several States. Thus the Constitution does not articulate which people can vote for members of Congress. We know that as a matter of fact that both women and blacks were systematically and routinely denied access to the voting booth.

The method of apportionment and the method of election again appear in Article II concerning the Presidency. The President is to be elected by a number of electors "equal to the whole number of Senators and Representatives." Apportionment affects the number of Representatives a State has and thus the number of electors. The manner of selecting the electors is left to the various state legislatures.

Article III concerns the judicial branch and nothing is said about how Supreme Court justices are appointed. However, Article II, Sect. 2.2 clearly indicates that the President nominates and then appoints such person, "with the advice and consent of the Senate."

In reflecting on these three articles, it is apparent to me that being counted for apportionment was crucial because a state's number of Representatives was determined by this. Senators were not so determined. The Constitution does not prescribe how the several States should govern themselves. It is apparent that the "peoples'" Representatives and Senators had significant power relative to the other branches of federal government. It is also apparent that state legislatures had significant power to determine who gets to vote for both the legislative and executive branches of government and eventually for the judicial branch as well. The right to vote is essentially a states-rights determination.

My conclusion from this reflection on the first three articles is this--the people in "we the people" is determined by the several states. The representative form of government so essential to our way of thinking depends on who gets to vote for the representatives. Not everybody gets this vote and our founders deferred the crucial issues to the states. The federal form of government permitted states to determine who got access to the ballot box.

The Constitutional Convention adopted the Constitution of September 17, 1787. The several states completed the ratification process on May 29, 1790 and was effective on March 4, 1789.

It is indeed fitting that "we the people" celebrate this historic document. Whatever its faults we have survived and we have changed and we have improved. This document has given us some political stability, and many of its values survive nearly intact--particularly the separation of powers and the balance of powers.

In July of 1787 another document became part of our history as a country and our history as a state. On July 13, 1787 the Congress established by the Articles of Confederation passed the Northwest Ordinance. The Ordinance was in two parts: the first concerned the political organization of the Northwest. The second part was called "Articles of Compact." These articles were a compact between the thirteen States and "the people and States in the said territory."

The following six articles are interesting both in their own right and in relation to the Constitution. Article 1 grants the right of religious freedom. Article 2 grants a variety of legal rights including habeas corpus, trial by jury, and the prohibition of the infliction of cruel and unusual punishments.

Article 3 needs to be quoted in full:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken fromthem without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded on justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.

Indians have rights and their standing is based on justice and humanity and not on how they count for purposes of apportionment (depending on their tax status). They have both property and liberty and the attitude toward them is peaceful and friendly.

Article 4 concerns the relationship of the territory to the United States and discusses taxes, debts, expenses, and so on. Article 5 establishes the boundaries of the territory as well as the process for becoming a State.

Article 6 also needs to be quoted in full:

> There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted: Provided, always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her service as aforesaid.

Although it is not clear if Blacks can vote in this article, it is clear that slavery is not permitted.

It is interesting to speculate why the Ordinance of 1787 seems to take a more enlightened view about Indians and Blacks. It is interesting that the Ordinance includes many of the rights we take for granted but which are not mentioned in the Constitution that was ratified in 1790.

But our reflections continue. On September 25, 1789 Congress introduced ten amendments now known as the Bill of Rights. These amendments became effective on December 15, 1791, more than four years after the Northwest Ordinance was passed. Four years is perhaps not so long a time.

Many of the rights we take for granted are listed in this Bill of Rights--freedom of religion, of speech, of the press, of assembly and so on. Several of the articles mention "the people" specifically.

Article 2 claims that the right of the people to keep and bear arms shall not be infringed.

Article 4 claims that the rights of the people to be secure from unwarranted search and seizure shall not be violated.

Article 5 claims that "persons" have rights in criminal proceedings.

Article 9 claims that the people retain rights not mentioned in the Constitution.

Article 10 claims that some powers are reserved to the states and the people.

None of these amendments, no matter how necessary they seem to our political life, tells us who counts as a people (or a "person" if they are the same) and none addresses the Indians or the slaves. It seems clear that the Constitution and its first ten amendments excluded many people from full participation in the political life of our new republic. The Ordinance was at least more enlightened but perhaps not as enlightened as some would want.

Since it took only about four years from the Ordinance to the Bill of Rights, some hope might have been given that other changes might occur fairly quickly but they did not.

Article 5 of the Constitution prescribed the procedure for amending the Constitution, a procedure which was used to ratify the Bill of Rights. But only two amendments were passed in the next few years: Article 11 which restricted judicial power and Article 12 concerning the election of the President and Vice President.

It is not until the 1860's that we find more discussion of "we the people." Article 13, ratified on December 18, 1865, abolishes slavery in the United States. Article 14, ratified on July 23, 1868, is the first amendment to speak directly to defining "we the people."

Section One reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due

> process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

You might think our search for "we the people" is over. The people are the citizens and the citizens (as well as other persons) have both due process and equal protection rights. But Section 2 seems to take away what Section one seems to give.

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of said male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

The fact that the entire female citizenry was unable to vote as a matter of constitutional right had no bearing on apportionment. Their citizenship and their being counted for apportionment and their being twenty-one or older were not considered.

Article 15, ratified on March 30, 1870, states that the rights of citizens to vote cannot be denied because of race, color, or previous condition of servitude. One wonders here if being an untaxed Indian is a racial issue!! Women, of course, fall in none of the classes that are proscribed as irrelevant to the right to vote. Why does it take one hundred years to include Blacks in "we the people"?

But again our search for "we the people" is not over. We must wait another fifty years before approximately half of the citizens are permitted to vote as a matter of constitutional right.

On August 26, 1920, Article 19 was ratified. The right to vote granted to Blacks (males only) was now granted to women--nearly one hundred and thirty years after the Constitution was ratified.

There are two brief concluding chapters to our search for "we the people." In 1964 the 24th amendment struck down both poll taxes or other taxes as prerequisites for voting in federal elections. In 1971, Article 26 lowerd the voting age to 18.

We have now found "we the people" at least insofar as the right to vote is concerned. The people are all the citizens over eighteen years of age, unless excluded by act of rebellion or crime. I'm still not sure what to do about untaxed Indians. The right to vote does not accure to all citizens and many of our rights have nothing to do to our being a citizen since non-citizens have them as well. But, "we the people" who now form the United States, who consent to be governed, are the citizens of the required age.

I can only speculate on further and future chapters on defining people. Personally, I find it appalling that "we the people" have failed to ratify an amendment that would make it unconstitutional to discriminate on the basis of sex. There are some who want to extend the notion of legal person to incude the unborn. What will happen is a matter of conjuecture.

Change, hopefully for the better, is the value that permeates our search for we the people. There are some who celebrate the Bicentennial of the Constitution and the Northwest Ordinance as some great religious festival, that the Founders received the final and definitive revelation about human nature and political life. The U.S.

Constitution is no revelation. At best it represents a beginning--a beginning of a search for "we the people."

The religious reverence toward our founding document is both blasphemous and anti-democratic. At least one of our founders, a person who signed the original Constitution, a man who was unwilling to extend rights very broadly, warned us of this attitude.

> Some men look at constitution with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. . . . I am certainly not an advocate of frequent and untried changes in laws and constitutions . . . But . . . laws and institutions must go hand in hand with the progress of the human mind. [Thomas Jefferson]

The human mind has progressed since the late 18th century. I think it can progress more. I do not think progress somehow comes to an end. You may, of course, disagree with me on this progress. Which of us is correct is for the people to decide.

The most important (?) value that is recognized in our Constitution is the right to dissent. Within very broad limits of toleration, we can dissent on any issue. In fact the Declaration of Independence recognizes the rights of the people to revolt. Of course, within the Constitution there is no such right to revolution. But there is the right to amend the Constitution. And given the above reflections perhaps there is no greater freedom than to change the very form and sructure of our government.

The right to dissent will hopefully be exercised only in a lawful and peaceful manner. Yet the very form by which we are governed and the very rights we take for granted, were not achieved in lawful and peaceful manner. Blood was shed.

The right to dissent has, quite correctly, been extended to cover more people than the Founders were thinking of. The most peaceful and lawful manner of expressing dissent is to vote against the status quo, to vote against a certain proposition, to vote against a certain candidate.

There is a great danger when opinions are suppressed and/or people are denied access to the ballot box. California is now considering a proposition that would make English the official language of the state. One affect of this proposition, if passed, would be that all ballots would be printed in English only. The ballots are currently printed in English, Spanish and Chinese. If the proposition is passed, there is some danger that citizens will be denied access to the ballot box not because of rebellion or crime, but because they are not bilingual. One views count only if one speaks English. I find it difficult to believe that such a proposition is consistent with the spirit of the Constitution and perhaps not the letter either.

The Constitution was framed in a revolutionary spirit. Its history of amendments argues for extending the notion of citizenship to as many "people" as possible--meaning by citizenship ultimately the right to vote. This fundamental right to vote can be legitimately overridden only in the most extreme case. Neither sex nor race are legitimate exceptions. The burden of proof is always on those who wish to restrict the right to vote. Our reflections indicate that the only exception that seem legitimate are age (under 18) and certain criminal activity.

The very notion of representative democracy requires the fullest participation possible. Democracy thrives on the free exchange of

ideas--everybody's ideas. What is puzzling about all this is that the extension of the right to vote has a long and sometimes violent history and yet there are large numbers of people who seldom if ever vote. Apparently these people refuse to be full members of their government. In our system of government, that refusal is their right. They are part of we the people.